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REPLY COMMENTS OF THE

OHIO RAIL DEVELOPMENT COMMISSION

IN EX PARTE 582 (Sub. No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURE

December 18, 2000

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The Ohio Rail Development Commission (ORDC) is the agency of the State of Ohio mandated to "develop, promote, and support safe, adequate, and efficient rail service throughout the state." As such, ORDC has been, and continues to be, the lead Ohio agency in developing policies and positions regarding rail mergers.

ORDC has reviewed many of the comments submitted in November by the railroads, other government agencies, and shipper interests in the Ex Parte 582 proceedings. ORDC's comments herein primarily register Ohio's reaction to some of the November comments. However, ORDC remains fully committed to the comments and recommendations we have supplied to the Surface Transportation Board (STB) throughout this proceeding. Our reply comments submitted herein are meant to supplement those views.

In our comments herein, ORDC states that:

1) The STB Should Not Abandon the Paradigm Shift Regarding Enhanced Competition.

2) The STB Should Use Class II and III Railroads and States to Help Determine Where Enhanced Competition Is Appropriate.

3) The STB Should Continue to Insist on a Comprehensive Delineation of Merger

Benefits and Detriments.

4) The STB Should Mandate Mediation/Arbitration as the Preferred Method of Negotiation With Applicants.

5) The STB Should Encourage Up Front Service Agreements to Resolve Possible Merger Caused Service Problems.

1) The STB Should Not Abandon Its Paradigm Shift Concerning Enhanced Competition.

ORDC believes that overall the STB did an excellent job in devising draft rules in its October 3, 2000 decision. ORDC continues to commend the STB for advocating a "paradigm shift" and proposing that "enhanced competition" be an integral part of the fabric of any major rail consolidation application. ORDC urges the STB to stay the course on the concept of enhancing competition, despite the loud and vociferous opposition to this concept raised by various Class I railroads and the Association of American Railroads.

Much of the Class I railroads' argument against the new enhanced competition paradigm raises the specter of the federal government becoming the "industrial planner" for the rail industry, replacing the market place as the determining force in structuring railroad operations. ORDC believes that this "return to the bad old days of heavy handed regulation" argument is in many ways a Class I "straw man" being stood up before the STB only so that it can be easily blown away with the first strong free market wind.

ORDC believes, however, that the STB is quite capable of taking steps to protect industries other than the rail industry (e.g. coal, steel, chemical, aggregate, and agriculture) without imposing undue impacts on merging railroads, turning back the clock on regulation, or opening the Pandora's Box of open access. ORDC has long been an advocate of "Reasonable Access", in line with the principals of the Ex Parte 575 proceedings and the Railroad Industry Agreement. ORDC believes Reasonable Access fits well into the STB's new enhanced competition paradigm, without undue negative impacts on the Class I carriers. While ORDC strongly believes that market forces must be allowed to take their course, we believe just as strongly that railroads, as public utilities, have a responsibility to the business and industry of the United States to allow reasonable access to their systems, in line with the principles of the Railroad Industry Agreement, which is not dictated by the merging railroads own particular market driven needs.

ORDC urges that the STB meld the spirit and principles of the Ex Parte 575 process/Railroad Industry Agreement into the Ex Parte 582 rule making process. ORDC believes that the STB could use the Railroad Industry Agreement template to determine which requests for consideration of enhanced competition from non-applicants should be further considered for inclusion into the final merger decision as a condition of the transaction.

2) The STB Should Use Class II and III Railroads and States to Help Determine Where Enhanced Competition Is Needed And Appropriate.

In our November 17, 2000 comments, ORDC noted that the railroads and the public sector have differing views of what is in the public interest. ORDC posited that applicant railroads would merely seek the course of least resistance in developing ways to enhance competition, rather than meet any pressing public policy goal or objective. As noted by the North Dakota Public Service Commission in its November 17 comments, carriers would not risk much by offering competition rich shippers more competition.

In its November 17 comments, the New York Department of Transportation (NYDOT) also made a case that parties other than the applicant railroads should have a major role in determining what sort of enhanced competition would be appropriate. The NYDOT submission urged that the STB should adopt a rule which states that conditions to enhance competition proposed by railroad applicants:

> *"...will not carry any presumption of superiority to conditions proposed by affected, interested parties, particularly shippers or public authorities."* NYDOT at 7-8

ORDC strongly agrees with NYDOT in this regard. The STB should give the same weight to reasonable requests for enhanced access from other parties as they give to the applicants. ORDC recognizes, however, that the STB would need to assess the possible adverse impacts which requests for enhanced competition would have on the economics and operations of the applicants.

ORDC believes that adopting the NYDOT approach would assure the states and Class II and III railroads a reasonable basis on which Reasonable Access issues could be developed and fairly considered.

3) The STB Should Continue to Insist on a Comprehensive Delineation of Merger Benefits and Detriments.

Class I railroads and the AAR adamantly argued against proposed rules requiring a detailed delineation of the benefits of the proposed merger. They cited problems with predicting the future and the need for clairvoyance to fulfill proposed requirements.

ORDC strongly urges the STB to maintain and augment its requirement for predicting the benefits of the transaction. ORDC firmly believes that the STB, or other government bodies such as the states, will not be able to effectively assess a proposal, especially in terms of what reasonable enhanced competition might be sought, without details about anticipated benefits and detriments of the transaction. ORDC reiterates its November 17 position whereby we called for the STB to require applicants to address benefits and detriments in a variety of categories. *ORDC at 9-11*

ORDC expects that the benefits from the final round of transcontinental mergers will largely accrue to those parties who already have competitive options, not captive shippers. ORDC believes that in end to end mergers, captive shippers of bulk commodities find themselves in a position similar to the airline passenger who discovers that he is the only one on board the flight paying full fare. While he might understand that it is nothing personal, just the way the airlines work, his first thought will certainly not be that he is glad that the airline is making enough money to keep his flight in the air.

ORDC sees no economic incentive for railroads undertaking a transcontinental rail merger to pass on the cost savings of more efficient operations to existing captive

shippers. Truly captive shippers will continue to pay "full fare" while the merging railroads use aggressive pricing strategies to garner new traffic now being handled by trucks or barges. Indeed, the Class I railroad submitting testimony in this proceeding time and again point out that the benefits of the next round of mergers will be better competition with other modes. not better rates for captive shippers.

ORDC believes that requiring complete benefit analysis is the best way to fully evaluate the proposed merger transaction. The railroads may not be able to accurately prognosticate and the STB certainly must not impose any penalties for good faith efforts to calculate benefits. But by requiring the applicants to address a wide variety of benefit categories, it will become crystal clear which parties most benefit, and which do not benefit at all.

4) The STB Should Mandate Mediation/Arbitration as the Preferred Method of Negotiation With Applicants.

ORDC sees the wisdom of the STB's reliance on negotiations as the preferred method of resolving merger related issues. However, ORDC is outspoken in its belief that small communities, small shippers, and many other affected parties have neither the economic or political wherewithal to effectively negotiate with mega-railroads, nor the resources to effectively plead their cases before the STB. In its November 17 comments the U.S. Department of Agriculture urged that the Board should actively monitor negotiations between applicant carrier and shipper and connecting railroads in view of the large difference in market power and the tendency for the needs of small shippers to be ignored. In effect, mere reliance on direct negotiations with mega-railroads would

severely limit access to the process for many public and private interests.

In our previous pleadings in this proceeding, we have strenuously argued for mediation/arbitration which is mandatory for the applicant railroads, but optional (but strongly encouraged) for other parties. We have urged that STB supplied arbitrators would be the best solution, but that STB trained arbitrators would also be very useful. Finally, we have argued for the need for the STB to fully staff its Office of Public Council. We urge the STB to revisit ORDC's requests. We believe that the STB has a duty to maximize effective access to the process of determining what America's transcontinental railroads will look like.

5) The STB Should Encourage Up Front Service Agreements to Resolve Possible Merger Caused Service Problems.

Some of the Class I railroad comments pointed out that the next round of mergers will be end to end, and will most likely avoid the service problems of the UP/SP and Conrail Sale transactions. ORDC believes that the Class I's are probably correct in this regard and that the concentration on service disruption issues may indeed be tantamount to fighting the last war. However, with the wounds of the service disruptions of the Conrail transaction still not totally healed, ORDC remains adamant that merging railroads must be responsible for remunerations if service problems do occur in any future merger. ORDC reaffirms its November 17 testimony in this regard. *ORDC at 3.*

After reviewing the US Department of Transportation's (USDOT) November 17

comments, however, ORDC believes that service agreements negotiated as part of the merger process would go a long way toward ensuring that the proper remunerations would be paid if post merger service became a problem. We believe that the USDOT proposal which states that the applicants should be urged to enter into "self-executing agreements for obtaining relief and/or compensation"(*USDOT at 9) s*hould be considered by STB. If indeed the end to end mergers will not cause service problems, the applicant railroads should have little objection to entering service agreements with shippers and small railroads who seek them.

Conclusion

ORDC appreciates the opportunity to participate in these proceedings and hopes that its views will contribute meaningfully to adoptions of new policies and rules which will work in the best interests of all concerned.

Respectfully Submitted,

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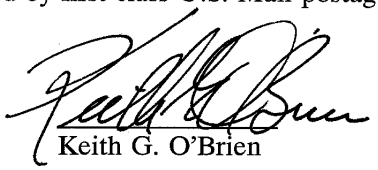
CERTIFICATE OF SERVICE

I hereby certify that I have on this the 18th day of December, 2000, served a copy of the forgoing on all know parties of record by first class U.S. Mail postage prepaid.



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